Nos. 382 and 385

IN THE

SUPREME COURT

OF THE

United States

October Term, 1957

THE FIRST UNITARIAN CHURCH OF LOS ANGELES,
Petitioner,

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, et al,
Respondents.

VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,
Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR,
Respondents.

ANSWER TO AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION.

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ANSWER TO AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION.

Re-reading of the amicus curiae brief of American Civil Liberties Union herein prompts answer to some things said therein and some consideration fuller than we were able to make in respondents' consolidated brief

giving common consideration to petitioners' consolidated opening brief and to the two amicus curiae briefs.

I.

Denial of Exemption Was Not Based on Assumption of Advocacy.

This proceeding does not involve and petitioners may not validly assert or imply or assume that they do not advocate violent overthrow of our government or war time support of the enemy. On the record the petitioners have not alleged that they do not so advocate. The complaints or either of them instituting the present litigation do not so allege. The fact of non-advocacy was not alleged such as to put it in issue or permit evidence or showing in court or finding by the court or any assumption or conclusion thereon. (Resp. Consol. Br. p. 24.)

Petitioners' assertion of right to exemption is made not under or pursuant to article XX Section 19 but contrary thereto.

The brief indicates the mistaken idea or analysis that the denial of tax exemption was based on an assumption of advocacy because of refusal to subscribe the declaration of non-advocacy. Instead, the denial was based on the failure of the applicants to meet one of the conditions prescribed therefor. The brief states the idea that

> "This is not a situation where the tax exemption was denied or revoked because petitioners had been

duly found to be engaged in such advocacy . . . Here the denial of a tax exemption was based solely on petitioners' refusal to subscribe to a declaration or oath of non-advocacy . . .

"In this process the taxing authorities have arbitrarily *assumed* that petitioners are engaged in such advocacy simply because they refused to subscribe to an oath that they were not doing so." (p. 9).

And in reiteration of the same idea we read on the following page:

"The criteria for exemption is not actual advocacy but the making of a declaration of non-advocacy." (p. 10).

The misconception is dispelled upon slight analysis. If a state has the power to deny exemption to those churches which in fact advocate violent overthrow, and if the use of a declaration is a reasonable means of answering the question of advocacy and of effectuating that power, then obviously exemption is denied not because of the refusal *per se* to declare but because, by the refusal, the property owner fails to bear the burden of showing qualification for the exemption.

The question is not whether the state may deny exemption for refusal to make the declaration; rather, the question is whether the state has the power, in the face of freedom of speech, to deny exemption to an organization which does in fact advocate overthrow. We submit that the State of California does in fact have such power.

II.

The Requirement of the Declaration Does Not Abridge Freedom of Speech under the First Amendment (in supplement of Resp. Consol. Br. p. 54).

On the question of the basis of this power the first consideration is on what grounds exemptions are granted. As already seen (Consol. Op. Br. p. 12) exemptions are granted because the social benefit from the exemption is deemed by the state to equal in value the diminution in tax revenue resulting from the exemption. Where the exemption claimant fails to satisfy the requirements established by the state as a condition of receiving the exemption, it will not be granted, as for example where the property is not used solely for religious worship or is a source of rental income. Cal. Const. Art. XIII, §1½. Thus California has determined that the net value to society of organizations advocating the violent overthrow of the government or the support of a foreign government in the event of hostilities, is not such as to entitle such groups to public funds.

Though this policy has an incidental effect on speech, it is not *ipso facto* void under the First Amendment. It is fundamental that freedom of speech, though sacred, is not absolute. Certain types of speech have been held, by their very nature, not to be the sort which the First Amendment was designed to protect under any circumstances. *Roth v. United States,* 354 U.S. 476 (obscenity); *Beauharnais v. Illinois,* 343

U.S. 250 (group libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (" . . . . the loud and obscene, the profane, libelous, the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," " . . . offensive, derisive or annoying . . . . language." (ib. pp. 569, 572)).

When, however, it is not so obvious that the speech being regulated falls outside the protection of the First Amendment, it is necessary to set forth a formula by which the validity of the regulation may be tested. One such standard involves (1) weighing the public interest to be promoted as against the individual right of free speech and expression.* The other standard is (2) the "clear and present danger" test. It would appear that the latter may be applied in cases where the restraint on speech is direct, such as is the case with sedition statutes, while the former is applied where, as here, the restraint is an indirect result of some other statutory purpose. In *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, the Supreme Court held valid the provision of the Taft-Hartley Act, which required a non-Communist affidavit of union officers as a condition precedent to the union's invoking the services of the N.L.R.B. Speaking of that case in the *Dennis* case, this Court said:

**Prince v. Massachusetts*, 321 U.S. 158 (1944) indicates that there is no greater protection for one First Amendment freedom than for another, and that the same type of balancing process suggested here is appropriate when there is raised a valid claim of infringement on religion.

> "We pointed out that Congress did not intend to punish belief, but rather intended to regulate the conduct of union affairs. We therefore held that any *indirect* sanction on speech which might arise from the oath requirement did not present a proper case for the 'clear and present danger' test, for the regulation was aimed at conduct rather than speech." *Dennis v. United States*, 341 U.S. 494, 507. (Emphasis supplied.)

In the *Douds* case itself the Court had said:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an *indirect, conditional, partial* abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 399, 94 L. ed. 944. (Emphasis supplied.) *Accord, United States v. Harriss*, 347 U.S. 612 (1954).*

Further Douds said:

> "Considering the circumstances surrounding the problem—the deference due the congressional judgment concerning the need for regulation of

*Picketing, especially when peaceful, is a means of communication not very unlike speech. Therefore, it is significant to note that the Court has upheld numerous prohibitions of picketing, which prohibitions had been effected because the purpose sought to be achieved by the picketing were against public policy. This was done in the face of First Amendment objections by applying the balance of interests test. *Building Service Employees Int'l Union; Local 262 v. Gazzam*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters, etc., Union, Local 309 v. Hanke*, 339 U.S. 470 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

> conduct affecting interstate commerce and the effect of the statute upon rights of speech, assembly and belief—we conclude that §9(h) of the [Labor-Management Act] does not unduly infringe freedoms protected by the First Amendment." (339 U.S. 382, 411, 412.)

In *United Public Workers (CIO) v. Mitchell,* 330 U.S. 75, this Court, applying a balance of interest test, held that the Hatch Act, which proscribes partisan political activities by employees of the federal government, was valid in the face of First Amendment objections. Speaking of that decision, the Court later said in Douds:

> ". . . the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgement of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment." (339 U.S. 382, 405.)

Applying herein the balancing analysis, on one side stands the interest of the state in administering its tax policy, and on the other stands an indirect incursion on Petitioners' right of free speech. The "large public interest in the efficiency of government service" in the *Mitchell* case, and the "need for regulation of conduct affecting interstate commerce" in the *Douds* case seem direct analogy to the interest of Cal. in determining where tax benefits ought to be be-

stowed. The power of a state to allocate its limited resources is fundamental to its existence. This heavily outweighs any infringement of free speech employed in advocacy of violent overthrow of the government or of war time support of a foreign government.

Furthermore, the possible infringement of First Amendment rights is inherently less where, as here, the person affected has a choice, and the choice is free; that is to say there is no penal liability incurred no matter which choice is made, (unless, of course, the declaration, if made, is false).

Tax exemptions are within the discretion of the state; so is admission to the bar. This Court in *In re Summers,* 325 U.S. 561 gave some indication of how far it would go in allowing the exercise of that discretion. Illinois refused Summers admission to the bar on the ground that, as an advocate of non-violence, he would not and in good conscience could not take the oath to support the state constitution. This Court upheld the state's action despite concession by both parties that non-violence was his valid and honest religious belief, and despite the fact that the odds were almost overwhelming against his ever being called upon to fight to defend the state constitution. The decision was rested on the basis of the state's discretion. In exercising this discretion, not unreasonably, the state was not unconstitutionally infringing Summers' religious freedom.

Cases concerning state employment afford another example of the extent to which the state's discretion may validly affect or abridge First Amendment rights, in balancing the state's interests against those rights. In *Adler v. Board of Education,* 342 U.S. 485 the Court sustained the Feinberg Law of New York which provided for disqualification of teachers and school employees who advocated the overthrow of the government by unlawful means or who were members of organizations having that purpose. Therein this Court said that, while it was clear that teachers had a right to assemble, speak and think as they wished, it was " . . . equally clear that they have no right to work for the State in the school system on their own terms." 342 U.S. at 492. The Court declared that there was no limitation on the freedoms of speech and assembly except in the remote sense that such a limitation is inherent in any choice. *Garner v. Board of Public Works,* 341 U.S. 716 also involved assertion of free speech violation by a city ordinance requiring a loyalty oath as a prerequisite of city employment. The Court upheld the oath requirement, however, without referring to the speech claim. *Hamilton v. Regents of Univ. of Cal.,* 293 U.S. 245, upheld a state requirement of compulsory military training as a condition precedent to enrollment in land grant colleges in face of the claim that it violated freedom of religion.

These principles are recently restated in *Slochower v. Board of Education,* 350 U.S. 551 (1956), *modified,*

351 U.S. 944 (1956). The statute there required the dismissal of school teachers invoking the Fifth Amendment. This violated due process, there being no reasonable connection between invocation of the Fifth Amendment and incompetency to teach. There is no such shortcoming herein. But the language of *Slochower* is helpful in stating the problem:

> "The problem of balancing the State's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." 350 U.S. at 555.

We submit that this is the problem which confronts the state in granting tax exemptions. It is incumbent on the state to take reasonable precautions to avoid giving tax benefits to organizations which will use them in pursuance of activities which were not intended to be subsidized. By substituting the word "exemption" for "employment" in the above quotation from *Slochower* its principle applies to the cases at bar. Here, as in *Garner* the state's inquiry is a reasonable one for valid reasons and does not unconstitutionally infringe any rights of religion, speech, assembly, or press.

Finally, in weighing the interests in a free speech context, this Court will observe the deference due the

legislative determination. Declaring it a matter for legislative rather than judicial determination, Mr. Justice Frankfurter said:

> "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . .
>
> "Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress." *Dennis v. United States*, 341 U.S. 494, 525.

In sum, we submit that the deep interest of Cal. in determining the proper administration of its tax policy far outweighs any indirect and unsubstantial incursion of Petitioners' free speech.

III.

The Cal. Supreme Court's Determination was Sound, that the Smith Act Did Not Preclude the State's Action (in supplement of Point VI, Resp. Consol. Br. p. 66).

Petitioners conclude that *Commonwealth v. Nelson,* 350 U.S. 497 (1956) renders invalid Article XX, Section 19 of the Cal. Constitution and Section 32 of the Revenue and Taxation Code. This Court there struck down the Pennsylvania sedition law on the ground that the federal government had, by the Smith Act, occupied the field of punishing sedition. In holding that Congress had excluded the states from the enforcement of " . . . anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc.," 350 U.S. at 508, the Court stated three considerations by which state legislation should be tested. These tests are: the intent of Congress to occupy the field, the existence of a dominant federal interest in the area, and a harmful conflict of administration. Tested by these considerations the Cal. constitution and statute do not fail.

The three tests presumably cannot be applied independently of one another. To ascertain the intent of Congress, reference must be had to the other considerations, *viz,* the existence of a dominant federal interest and the probability of a harmful conflict of administration, since these are the considerations on which Congress must have formed its assumed intent.

Preliminarily it is to be remembered that it is a tax statute before the Court. Consequently, it is not in a field jointly occupied by the state and federal governments which the latter can occupy to the exclusion of the state. The state has the power to tax because it is sovereign. Hence, there could hardly be a valid federal intent to occupy the field; nor a valid dominant federal interest in the area; nor the possibility of a harmful conflict of administration.

The determining factor on the question, whether or not the federal government has occupied the field is the existence of a dominant federal interest. As has been pointed out, there is no such federal interest in the field of state taxation. Nor can federal interest in the field of enforcement of criminal sedition laws be such as to invalidate a state tax statute which in no way impinges on that enforcement.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, there was a conflict between a state law and a federal law regulating warehouses. And, as in *Nelson*, the conflict was one of administration; and the conflict was necessarily resolved in favor of the superior federal interest. See also *Hines v. Davidowitz*, 312 U.S. 52. The instant case presents no such problem.

Slochower v. Board of Education, 350 U.S. 551 (1956), *modified*, 351 U.S. 944 (1956), decided one week after *Nelson*, is a case analogous to the one at bar. Though holding the state's action unconstitutional, the Court said, *inter alia*: "The problem of

balancing the *State's interest in the loyalty* of those in its service with the traditional safeguards of individual rights *is a continuing one.* . . . " " . . . Slochower's continued employment . . . [might] be inconsistent with a real interest of the State." 350 U.S. at 555, 559. (Emphasis supplied.) In reaching this conclusion the Court referred favorably to its pre-*Nelson* holdings of *Adler v. Board of Education,* 342 U.S. 485 (1952) and *Garner v. Board of Public Works,* 341 U.S. 716 (1951). The clear implications of the *Slochower* decision is that the Court did not intend the *Nelson* decision to extend to the instant case.

The state is not here seeking to enforce any sedition law. It is not imposing any criminal penalty for seditious acts. The only criminal prosecution which could occur would be prosecution for perjury, a field not occupied by the federal government to the exclusion of the states.

The words of Chief Justice Hughes in *Kelly v. Washington ex rel. Foss Co.,* 302 U.S. 1 are appropriate:

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." 302 U.S. at 10.

"The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 203. The federal government has indicated no intent to occupy the field of the present statute and, indeed, *quaere* whether it could. None of the reasons for invalidation of the state statute in *Nelson* are present here. As this Court has indicated in *Slochower* the state still has a valid interest in the loyalty of its school teachers. The state's interest is just as valid when it concerns those, like petitioners, seeking a tax exemption.

Conclusion

We respectfully submit that the petitions should be dismissed and the decisions by the California Supreme Court be affirmed.

Respectfully submitted,

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